1983

Go Real Estate Company, Inc., A Utah Corporation v. R. Niel Smyth, As Trustee For Sjm Trust : Respondent's Brief On Appeal

IN THE SUPREME COURT OF THE STATE OF UTAH

GO REAL ESTATE COMPANY, INC., A Utah corporation, Plaintiff/Respondent, vs R. NIEL SMYTH, as Trustee for SJM TRUST, Defendant/Appellant.	Case Number 19057

RESPONDENT'S BRIEF ON APPEAL

* *

Appeal from a Summary Judgment, Findings, Conclusions of Law, and Judgment, of the Fifth Judicial District Court of Iron County, State of Utah.

The Honorable J. Harlan Burns
District Judge presiding

* *

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BRIEF OF PLAINTIFF/RESPONDENT

NATURE OF THE CASE

This is an action on a promissory note.

DISPOSITION IN THE LOWER COURT

The trial court granted Plaintiff summary judgment as to liability, principal and interest due on the promissory note. After a trial on the issue of attorney fees, the court gave judgment to Plaintiff for reasonable attorney fees.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks affirmance of the judgment of the trial court and requests it be awarded its costs on appeal. Plaintiff also requests that it be awarded attorney fees in connection with the appeal and asks that the case be remanded

to the trial court to determine the [illegible] such award.

STATEMENT OF FACTS

(SUBSTANTIVE FACTS)

On or about 27 March 1981, Appellant SMITH, by and through his attorney in fact, Jan C. Memmott, executed and delivered to Respondent GO REAL ESTATE COMPANY, INC., for value received, a promissory note. The promissory note was payable in one installment of $11,800.00, with interest from 1 April 1981 at the rate of 12% per annum until 1 June 1981 when the entire note was due. Thereafter, interest accrued at the rate of 14% per annum upon both principal and interest. The note contained a provision for an award of attorney fees to Plaintiff. Although the heading on the note recited that it was secured by a deed of trust, no such security existed. (R-2, paragraphs 4-7; and R-9). No conditions precedent were placed upon payment of the note. Defendant SMITH failed to pay the note when it came due on 1 June 1981, or at any time thereafter. (R2, paragraph 5).

After Defendant SMITH failed to pay the promissory note, on 18 August 1981, Plaintiff wrote to the trustor of SCM Trust, Mr. O. Douglas Memmott. In its letter to O. Douglas Memmott, Plaintiff sought payment of the note. Memmott apparently had never before seen the note except

[illegible] Defendant SMYTH, and Plaintiff enclosed a copy for Mr. [illegible]'s review. Plaintiff specifically informed Mr. [illegible] of its intention to sue unless a satisfactory response [illegible] was obtained. (R-8, paragraph 2, with attached letter dated 8/18/81).

On or about 8 September 1981, Mr. Memmott replied with a letter to Plaintiff. He effectively acknowledged the promissory note, stated that he had not previously been aware of its payment terms, and offered to make monthly payments of $1,000.00 per month. Mr. Memmott's letter also asked Plaintiff to locate buyers for some water rights owned by him. (R-8, paragraph 3, with attached letter dated 9/8/81).

It is significant that neither Defendant SMYTH, Mr. Jan [illegible] Memmott nor Mr. O. Douglas Memmott ever paid anything at [illegible] the promissory note, despite Mr. O. Douglas Memmott's offer to begin doing so.

On or about 10 November 1981, Plaintiff wrote to Mr. O. Douglas Memmott concerning listing of certain land, equipment and water rights that Mr. Memmott desired to sell through Plaintiff's brokerage. The letter recited a previous indication by Mr. Memmott that "any sale we might make on equipment could be applied against the note which is owed to Go Real Estate, [illegible] Trust." No reference was made to using proceeds [illegible] of land or water rights as credits against the

promissory note. Plaintiff then invited Mr. O. Douglas Memmott to make payments of $1,000.00 per month on it until it was either completely paid by such payments or until it was "cleared off" by monies generated from sales. (R-5, paragraph 3, with attached letter dated [illegible])

The record is absolutely void of any evidence that O. Douglas Memmott ever agreed in writing that equipment sale proceeds could be used to apply to SMYTH's note, that he, O. Douglas Memmott, agreed to answer for the debt of SMYTH, as required by UCA 25-5-4 (1953, as amended); that any agreement was ever reached that Memmott would pay $1,000 per month on the note, or that he ever did so, that Plaintiff ever agreed to look exclusively to proceeds from some alleged land sale or any other sale as sole source for payment of the note, or that Plaintiff ever waived its right to proceed against Defendant SMYTH on the promissory note.

Defendant has asserted that no demand for payment was made after Plaintiff's letter of 10 November 1981, and therefore claims that Plaintiff and Defendant agreed, by silence, that payment of the promissory note by SMYTH was made contingent upon "the resale of the property as directed in the letter of 10 November 1981." (R-8, paragraph 6)

PROCEDURAL FACTS

This action was commenced by the filing of the [illegible] on 22 October 1982. (R-1). On 16 November 1982, counter-

... Defendant SMYTH accepted service of process. (R-1 1/2). ... November 1982, Defendant's answer was filed. (R-3). On ... December 1982, Plaintiff filed its Motion for Summary ... (R-4), which was supported by the Affidavit of W. ... Gardner, (R-2) and by the Affidavit of Willard R. ... op. (R-5).

On 6 December 1983, Defendant caused the Affidavit of ... Douglas Memmott, dated 29 November 1982, to be filed. (R-6) Still later, on or about 13 December 1982, Defendant filed the Affidavit of James L. Shumate. (R-6 1/2).

On 13 December 1982, Plaintiff filed its Motion to Strike Affidavit of O. Douglas Memmott, asserting that the Affidavit of O. Douglas Memmott did not comply with the requirements of URCP 56, in that, among other things, it failed to show that it was made upon the personal knowledge ... Douglas Memmott, that the information contained therein ... conclusory in nature, consisted of inadmissible hearsay, ... nothing more than an attempt to vary the terms of a written agreement by parole, that it was in violation of the ... statute of frauds, and that O. Douglas Memmott ... be permitted to testify concerning the matters set ... the Affidavit. (R-7).

... an effort to remedy the defects contained in the ... Douglas Memmott, dated 29 November 1982, on ... 1982, Defendant caused the Affidavit of O.

Douglas Memmott in Opposition to Motion for Summary Judgment to be filed. (R-8). In his affidavit, Mr. Memmott set forth certain correspondence between him and W. Dillin Gardner, President of Plaintiff. The existence of the correspondence is undisputed.

Paragraph 4 of the Affidavit of O. Douglas Memmott in Opposition to Motion for Summary Judgment essentially fails to set out any facts, and stated only the conclusion of O. Douglas Memmott that by reason of the alleged failure of Plaintiff to make demand for payment of the Promissory Note after 10 November 1981, it was the position of Mr. Memmott that, by silence, an agreement was reached between Plaintiff and O. Douglas Memmott that payment of the promissory note was "contingent upon the resale of the property as discussed in the letter of 10 November 1981." (R-8)

Plaintiff's Motion for Summary Judgment came before the Court for hearing and disposition on 4 January 1983. (R-28). The matter was submitted to the court for ruling upon the status of the file, without oral argument. Thereafter, on or about 7 January 1983, the trial court entered a minute entry, awarding summary judgment to Plaintiff and against Defendant, reserving only the issue of attorney fees for trial. (R-11). In the minute entry, the court noted that Plaintiff's objection to the Affidavit of O. Douglas Memmott were well-taken. At a later hearing on 19 February [illegible]

the court clarified that it had ordered that the Affidavit of O. Douglas Memmott be stricken, but that it had permitted the Affidavit of O. Douglas Memmott in Opposition to Motion for Summary Judgment to stand, that he had considered that affidavit, but that it did not change the decision. (R-30, page 2, lines 19-25, and page 3, line 1.).

The remaining issue pertaining to reasonable attorney fees was set for trial on 18 January 1983. At that time, the issue was tried and resolved in Plaintiff's favor. (R-27, R-29).

On 7 February 1983, Defendant filed his Motion for Re-Hearing. (R-13). He also filed his Objection to Proposed Summary Judgment. (R-13 1/2). Plaintiff filed its Memorandum of Points and Authorities in Opposition to Motion for Re-Hearing, on 14 February 1983. (R-14). Plaintiff also filed its Motion for Execution of Summary Judgment, Findings of Fact and Conclusions of Law, and Judgment. (R-15).

On 15 February 1983, the various matters pending before the trial court were argued. The court reviewed the Summary Judgment, Findings, Conclusions of Law, and Judgment, and executed the same (R-16). The trial court determined that the Affidavit of O. Douglas Memmott did not comport to the requirements of URCP 56(e). (R-16). The court ordered the Affidavit of O. Douglas Memmott stricken, but permitted the Affidavit of O. Douglas Memmott in Opposition to Motion for

summary judgment to stand. (R-17, [illegible])

On 19 March 1985, Defendant filed his Notice of [illegible] (R-18)

ARGUMENT

POINT I

NO GENUINE ISSUE OF MATERIAL FACT AS TO DEFENDANT SMITH'S LIABILITY REMAINED FOR TRIAL, AND PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT AGAINST DEFENDANT AS A MATTER OF LAW.

1. No genuine issue of material fact remained for trial. The promissory note which is the subject of this action was executed and delivered to Plaintiff on or about 27 March 1981, for value received by Defendant. (R-2, paragraph 4; R-9). O. Douglas Memmott had never seen the promissory note until W. Dallin Gardner, Plaintiff's President mailed him a copy on 18 August 1981. (R-8, paragraph 2, with attached letter.) O. Douglas Memmott received the promissory note, indicated that he was not aware of its payment schedule, that cash flow in the trust was suffering, and offered to pay $1,000.00 per month on the promissory note. (R-8, paragraph 3, with attached letter) At some point, O. Douglas Memmott offered to allow proceeds from any sale made by Plaintiff of certain equipment, to be applied on payment of the promissory note. (R-8, paragraph 4, with attached letter dated 5 November 1982)

The record before the court is totally void of any

[illegible] of agreement between Plaintiff and O. Douglas [illegible], or anyone else, concerning the possibility that sale of real property would be the sole source for payment of the promissory note, that payment of the promissory note was contingent in any way upon the sale of any real property and is void of anything that would lend support to the contention of O. Douglas Memmott that such an agreement had been reached by silence.

As a matter of fact, the Affidavit of O. Douglas Memmott in Opposition to Motion for Summary Judgment misstates the contents of the letter of W. Dallin Gardner, dated 10 November 1981, and Mr. Memmott then goes on to take the position that an agreement had been reached because "none of the later conversations or contacts after November 10, 1981, had made demand for payment of the promissory note." It is this silence which is relied upon by Defendant to establish an agreement, despite the fact that when payment was not forthcoming, the suit was filed by Plaintiff.

URCP 56(e), states in part:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissable in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Affidavits in opposition to a motion for summary

judgment, to be effective, must set forth such facts as are admissible in evidence. In a case where an affidavit consisted of inadmissible parole evidence used for the purpose of varying the terms of a written agreement, such an affidavit was ineffective. Rainford vs Rytting, 451 P.2d 769 (Utah 1969). An affidavit does not comport with the requirements of URCP 56(e) where it reveals no evidentiary facts, but merely reflects the affiant's unsubstantiated opinions and conclusions in regard to the transactions. Walker vs Rocky Mountain Creation Corporation, 508 P.2d 538 (Utah 1963). An affidavit which is conclusory in nature is insufficient to meet its proponent's burden of showing the presence of a material issue of fact requiring trial. Albrecht vs Uranium Services, Inc., 596 P.2d 1025 (Utah 1979).

The Affidavit of O. Douglas Memmott in Opposition to Motion for Summary Judgment does not state any facts which could give rise to even an inference that an agreement had been reached that a promissory note would not be payable until certain real property was sold by Plaintiff. Even if such an agreement were to have been made, its existence was not before the court by reason of the manner in which O. Douglas Memmott, a lawyer, attempted to present it to the effect O. Douglas Memmott said that since Plaintiff

[illegible] payment of the promissory note after 10 November [illegible] until the filing of the complaint in this action, [illegible] agreement that the promissory note would not be paid [illegible] out of the proceeds of sale of real property, was reached. It is significant that he failed to list the date, time, and place that any such agreement was made, who was present, what was said, and who said it. He only states that it is his position that an agreement was reached.

By reason of the fact that there was no issue of fact, and certainly no genuine issue of material fact remaining for trial, the trial court properly rendered summary judgment as to liability in favor of Plaintiff and against Defendant SMYTH.

2. Even if the agreement claimed by O. Douglas Memmott had been reached, it would be unenforceable by reason of the fact that Defendant SMYTH did not agree to pay and did not pay, any new consideration for the alleged modification.

An agreement altering a written contract, to be binding, must be based upon consideration. Harvard vs Anderson, 524 P.2d 880 (Wyoming, 1974). The general rule is, of course, that a modification can be nothing but a new contract, and must be supported by a consideration like every other contract. That is, where a contract has been executed, it cannot be modified except by an agreement supported by new consideration. 17 Am Jur 2d, 939-940, Contracts, §469, Consideration.

Where Defendant SMITH was obligated to pay the promissory note in full by 1 June 1981, any promise to make payments less than or later than the requirements of the promissory note, cannot and does not constitute new consideration. This court recently held that subsequent agreements between parties to a contract which amount to a change, modification, extension, or addition to the contract, are governed by the same rules as to proof and enforceability as the original contract. PLC Landscape Construction vs Picadilly Fish Co., 502 P.2d 562 (Utah, 1972). The basic requirement of a contract, of course, is consideration. The offer, if any, of O. Douglas Memmott, to have Defendant pay the note on terms less than contained in the note, is not consideration. The legal obligation to pay the amount in full had already accrued.

3. Even if the agreement as alleged by O. Douglas Memmott had been reached, it would be unenforceable as being in violation of Utah's Statutes of Fraud.

If it is the contention of O. Douglas Memmott that Plaintiff was offered an interest in real property of Defendant, from which the note could be paid, the agreement would not be enforceable under the terms of UCA 25-5-1 (1953, as amended), which requires any estate or interest in real property, other than leases for a term not exceeding one year, to be created in writing, subscribed by the party

[illegible] The alleged agreement would also be in violation of UCA 25-5-4 (1953, as amended), since there is no allegation that its term was less than 1 year, and since it was purportedly an agreement authorizing or employing an agent or broker to sell real estate for compensation. See specifically, UCA 25-5-4(1) and (5) (1953, as amended). The essence of Defendant's conclusions is that Plaintiff, a real estate broker, entered into a verbal agreement to sell real property, and in return, was to be compensated by payment of the promissory note which Defendant was already liable to pay. Such an arrangement is clearly unenforceable under the statutes cited.

POINT II

THE "SUMMARY JUDGMENT" IN THE LOWER COURT PROPERLY ALLOWS INTEREST TO BE CHARGED ON PREVIOUSLY ACCRUED INTEREST.

The promissory note which is the subject of this action provides for interest prior to 1 June 1981 at the rate of 12% per annum, and provides for interest thereafter on interest and principal at the rate of 14% per annum until [illegible] (R-9). UCA 15-1-4 (1953, as amended), states:

> "15-1-4. Interest on Judgment. Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of 12% per annum."

The specific language of the promissory note relating to interest after its due date is as follows:

> "Any installment of interest or principal not paid when due shall bear interest thereafter at the rate of FOURTEEN (14%) per annum until paid."

The parties agreed that interest and principal, if not paid when due, would bear interest at the rate of 14% per annum. The trial court simply required the summary judgment to conform to the provisions of UCA 15-1-4 (1953, as amended)

Defendant's contention that UCA 15-1-4 (1953, as amended), does not permit the inclusion of prejudgment interest in a judgment, upon which judgment interest will run at the required rate, is not supported by either the statute or case law in the State of Utah. See McFarlane v Winters, 201 P.2d 494 (Utah, 1949), in which the court construed the predecessor of UCA 15-1-4, and stated that it did not prevent inclusion of interest due as part of the principal of a judgment to be rendered.

CONCLUSIONS

The issue of "consideration" has never been raised with respect to Defendant's obligation under the original promissory note; only as to an alleged subsequent modification for which it has been shown that no new consideration was ever agreed to or paid by Defendant. No issue of fact

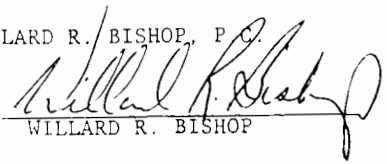
especially no genuine issue of material fact remained for trial and Plaintiff was entitled to judgment against Defendant as a matter of law. There was never any agreement concerning any alleged modification of the promissory note. Even if there had been such an agreement, it was not supported by new consideration, and is unenforceable by reason of the Utah Statutes of Frauds. The trial court properly included prejudgment interest as part of the principal amount of the judgment, and properly awarded interest on the judgment at the contract rate of 14% per annum.

This court should affirm the decision of the trial court, and should award Plaintiff its costs and attorney fees on appeal, and should remand the case for determination of a reasonable attorney fee to be awarded Plaintiff in connection with this appeal pursuant to the written agreement in the promissory note of Defendant to pay reasonable attorney fees, and pursuant to UCA 78-27-56 (1953, as amended).

DATED: 21 July 1983.

Respectfully submitted,

WILLARD R. BISHOP, P.C.

BY: 
WILLARD R. BISHOP

CERTIFICATE OF MAILING

SERVED two (2) copies of the within and foregoing "Respondent's Brief on Appeal", on the Defendant/ Appellant above named, by mailing two (2) full, true and correct copies upon Mr. James L. Shumate, Attorney at Law, at 110 North Main Street, P.O. Box 623, Cedar City, Utah 84720-0623, first class postage fully prepaid this 21st day of July 1983.